UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

MIDWESTERN PERSONNEL SERVICES, INC. and TRANSPORT LABOR CONTRACT/LEASING, INC., A Single Employer

and

Cases 25-CA-25503-2 25-CA-25823-3 25-CA-25978-5

CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL UNION NO. 215 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Michael T. Beck, Esq. for the General Counsel. James U. Smith, Esq., (Smith & Smith, Louisville, Kentucky) for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This supplemental proceeding was tried before me in Indianapolis, Indiana on June 7, 2011 pursuant to a compliance specification and notice of hearing issued on February 28, 2011. The compliance specification alleges the amount of backpay due under the terms of the Board's decision and order dated June 21, 2000, 331 NLRB 348, which was enforced by the U.S. Court of Appeals for the 7th Circuit on March 11, 2003, 322 F. 3d 969.

The Board, on February 28, 2006, issued its Supplemental Decision and Order, 346 NLRB 624, directing Respondent Midwestern Personnel Services, Inc. (MPS) to make whole 24 named discriminatees by payment of \$649,593.93, plus interest for their losses resulting from Midwest Personnel's unfair labor practices. The U.S. Court of Appeals for the Seventh Circuit entered its judgment on November 8, 2007 enforcing in full the reinstatement and backpay provisions of the Board's 2006 Supplemental Order, 508 F. 3d 418.

The issue before me in this phase of the litigation is whether Midwestern Personnel Services and Transport Labor Contract/Leasing, Inc. (TLCL) are a single-integrated business enterprise and a single employer and whether both are jointly and severally liable for the amount of backpay and other benefits owed pursuant to the Board's 2006 order as enforced by the Court

of Appeals. For the reasons stated below, I find this to be the case. TLCL's liability is significant because MPS does not have any assets with which to satisfy the Board's order.

A brief summary of the decision on the merits and the purchase of Midwestern's stock by Transport Labor Contract/Leasing

As set forth at 331 NLRB 348, this litigation began when Midwestern Personnel Services (MPS) provided transport and concrete mixer drivers to River City Holdings, Inc. (RHC) at a facility in Rockport, Indiana. The drivers were provided to enable RHC to provide cement products to the "AK Steel job." Midwestern's President Samuel Ware was personally involved in the transactions between his company and RHC.

On January 17, 1998, the Charging Party Union began a strike against Respondent MPS. On February 18, 1998, TLCL acquired 100% of MPS' stock, as well as that of its parent company Associated Companies, Inc. (ACI). TLCL is a holding company that does business only through its subsidiaries. TLCL's subsidiaries provide human resource services to small and mid-sized businesses, mainly in the trucking industry. Examples of these services are the administration of workers compensation insurance, payroll processing, benefits administration and, for the trucking industry, employee screening and selection, Tr. 52-53.

From February 18, 1998 until March 14, 2000, when he resigned, MPS President Ware reported directly to TLCL. The Union made an unconditional offer to return to work on behalf of the 26 strikers on March 27, 1998. Respondent MPS refused to reinstate the strikers, contending that they were economic strikers, who need not be reinstated if permanently replaced.

The General Counsel filed a complaint alleging, among other things, that MPS had violated Section 8(a)(3) and (1) in failing and refusing to reinstate the strikers immediately upon their unconditional offer to return to work. The matter was tried on September 20 and 21, 1999 before Board ALJ Jane Vandeventer. Attorney James U. Smith, who has represented MPS at every step of this litigation and who represents TLCL in the instant phase of this proceeding, represented MPS at the hearing on the merits. In her decision of February 9, 2000, Judge Vandeventer found that the strikers were engaged in an unfair labor practice strike and that therefore Respondent violated the Act in failing to reinstate them immediately upon their unconditional offer to return to work.

On March 14, 2000, Samuel Ware, resigned his position with ACI and MPS, and had no further relationship with TLCL or any of its subsidiaries. On that date, TLCL's Board of Directors appointed Richard Dyer as the sole director of MPS. The TLCL Board also gave Gary Ankerfelt, Executive Vice President and a director of TLCL, authority to execute contracts on behalf of MPS, G.C. Exh. 2, p. 439-40. The TLCL Board designated Timothy Coughlin, then the Chief Financial Officer of TLCL, as Treasurer of MPS.

In November 2000, the TLCL Board decided not to renew MPS' lease of office facilities in Olive Branch, Mississippi. This lease expired on January 31, 2001. The TLCL Board authorized Coughlin to lease office space for MPS and ACI, Inc. in Memphis, Tennessee. After Coughlin leased office space in Memphis, TLCL reassigned Stephanie Wasala from Minnesota to the Memphis office to perform payroll and other services for MPS and other subsidiaries

operating out of the Memphis office. To the present, TLCL files one tax return covering all its subsidiaries, including MPS.

On June 21, 2000, the Board issued its decision affirming Judge Vandeventer, 331 NLRB 348. In late 2002, Coughlin, by then Chief Operations Officer of TLCL, was designated President of MPS. As of June 2011, Coughlin was both President of MPS and CEO of TLCL. William Benson, the Chief Financial Officer and Treasurer of TLCL, is also the Treasurer of MPS. MPS' customer base remained stable during 2001-2002 and then eroded. MPS last generated revenue in 2003 and has had no internal employees since 2003. This was due in part to a decision by TLCL to provide its services to trucking company clients via subsidiaries other than MPS, Tr. 76-77. Thus, the fact that MPS has little or no resources to satisfy the backpay requirements of the Board's decision is at least in part the result of decisions made by TLCL.

On March 11, 2003, the U.S. Court of Appeals for the Seventh Circuit fully enforced the Board's June 2000 Order, 332 F. 3d 969. This decision was discussed by TLCL's in-house counsel Rodney Jordan at TLCL's Board of Directors meetings on March 27, 2003 and March 25, 2004. Tim Coughlin, then Chief Operating Officer of TLCL and President of MPS, sent a letter explaining the decision to the discriminatees in March 2003.

NLRB Region 25 issued a compliance specification and notice of hearing on June 30, 2003. A hearing was conducted by Board ALJ Ira Sandron on November 17, 2003 and March 22-24, 2004. On July 22, 2004, Judge Sandron issued a supplemental decision finding that MPS owed 24 strikers \$649,593.93 for a backpay period that began on March 27, 1998 and ended on December 31, 1999. Attorney James U. Smith again represented MPS. The Board issued its Supplemental Decision and Order on February 28, 2006, 346 NLRB 624, affirming the decision of Judge Sandron. This decision and order was enforced in full by the 7th Circuit Court of Appeals on November 8, 2007, 508 F. 3d 418.

Analysis

The hallmark of a single employer is the absence of an arm's length relationship among seemingly independent companies. The Board looks at four factors in making a finding of this issue: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. No single aspect is controlling and all four factors need not be present to find single employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case, *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007).

Common Ownership

Since February 18, 1998, about a month before the unfair labor practices giving rise to this case occurred, MPS' ownership has been identical to that of TLCL. Indeed, TLCL was MPS, and vice versa.

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Common Management

Since 2000, before the Board's decision on the merits and before the compliance specification was issued in this case, MPS and TLCL has had common management in the person of Tim Coughlin, Treasurer, then President of MPS and Chief Operating Officer of TLCL, Gary Ankerfelt an Executive Vice-President of TLCL, and William Benson, Treasurer of MPS and Chief Financial Officer and Treasurer of TLCL. Early in 2001, MPS' operations were comingled with those of other TLCL subsidiaries operating out of an office in Memphis, Tennessee.

Interrelation of Operations

Although Respondent at hearing emphasized that MPS' business was in some respects broader than that of other TLCL companies, this case arises from a situation in which the businesses of MPS and other TLCL companies were identical, i.e., the provision of human resource services to a trucking company. Thus, the fact that MPS has not generated revenue since 2003 is in part a function of TLCL's decision not to provide its services through MPS, but to provide these services through other subsidiaries.

While the record does not reflect why MPS ceased generating revenue in 2003, the temporal relationship between the decision of the TLCL Board not to market MPS and the March 11, 2003 Court of Appeals decision, suggests that there is a relationship between that the Court and Board of Directors' decisions and the fact that MPS has no assets to satisfy the Compliance Specification.

At the TLCL Board meeting, just 16 days after the Court of Appeals decision, TLCL General Counsel Rodney Jordan "discussed the steps Midwestern Personnel Service Corporation has and will take in response to the Court of Appeals decision to uphold the National Labor Relations Board's ruling in favor of the striking workers who were terminated by Mr. Sam Ware when he owned MPS," G.C. Exh. 2, p. 0553. Mr. Jordan, at that time, was also Vice President of Human Resources, General Counsel and Secretary of MPS, G.C. Exh. 4.

I infer that TLCL stopped marketing MPS at least in part so that it would have no assets to satisfy the back pay order. No other reasons appear in this record for the fact that MPS stopped generating revenue in 2003, as opposed to some other point in time. MPS generated revenue between 2000 and "sometime in 2003," after Sam Ware's relationship with MPS ended, G.C. Exh. 5, p. 47. There is no explanation as to why MPS' revenue came to a complete halt in 2003.

In this regard, Timothy Coughlin testified that MPS added customers in 2000, and that a lot of customers left MPS in 2000. He testified further that the client list was pretty stable in 2001 and 2002. Coughlin also testified that he believed the remaining customers left in 2003, but offered no explanation as to why they left or where they took their business, Tr. 33-34. At a

¹ Coughlin testified that none of MPS' customers were retained or transferred to other TLCL subsidiaries, Tr. 65.

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minimum, Coughlin's testimony shows that MPS' business did not collapse due to the departure of Sam Ware. It remained stable until 2003, when for unexplained reasons MPS stopped generating revenue.

Later, Coughlin testified, without any specifics, that he didn't "think" there was much of MPS left in 2002, Tr. 59, and that he "believed" that in 2003 its remaining customers left. Coughlin's testimony regarding MPS' status prior to the Court of Appeals decision is unsupported by any documentation. I decline to credit Coughlin's testimony as to the extent of MPS' business in 2002 and early 2003. In the somewhat different context of an economic defense to a layoff, Judge James T. Barker, who was affirmed by the Board, observed:

...having advanced an economic defense in explanation of a layoff accomplished in the suspicious circumstances here extant, it was incumbent upon Respondent in order to support his defense to proffer more than oral testimony.

Reeves Rubber, Inc., 252 NLRB, 134, 143 (1980).

By analogy one would expect that TLCL has records as to MPS' revenue between 2000 and 2003. Thus, it was incumbent for TLCL to proffer such records to show when and by how much MPS business declined during this period.

In any event, Respondent has offered no persuasive explanation for the MPS' cessation of revenue in 2003. Given this record, I infer that it was related to the Court of Appeals decision and TLCL's desire to avoid payment of the back pay in this case. I also find that TLCL's decision to spend four days litigating the compliance specification in front of Judge Sandron after the Court of Appeals decision on the merits also indicates a motive to avoid satisfying the back pay award by any means possible. Its efforts in this regard are inconsistent with those of company whose independent subsidiary had no assets to satisfy the compliance specification.

Centralized control of labor relations

When the unfair labor practices occurred, MPS President Samuel Ware was directly responsible to the Board of Directors of TLCL. Afterwards, all decisions made with regard to litigation of this case on the merits and the compliance specification were made by TLCL's common management with MPS, on the advice of the General Counsel of TLCL, who was also MPS' Vice President for Human Resources, General Counsel and Secretary, G.C. Exh. 4. On March 26, 2003, Timothy Coughlin as President of MPS, wrote the discriminatees concerning their reinstatement rights pursuant to the Court of Appeals decision. Additionally, TLCL has employed the services of the same outside counsel as did MPS throughout this entire litigation.

Considering all these factors, I conclude that MPS and TLCL are a single employer and that TLCL as well as MPS is liable for the amount specified in the compliance specification. The equities of this case, particularly the fact that TLCL may well have stopped marketing MPS in part to avoid satisfying the Board's Order dictates such a result.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondents, Midwest Personnel Services, Inc. and Transport Labor Contract/Leasing, Inc., a single employer, shall jointly and severally make whole the individuals named in the compliance specification by paying them the amounts following their names, plus interest accrued to the date of payment, in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 289 NLRB 1173 (1987) minus tax withholdings required by Federal and State laws.³

Dated, Washington, D.C. July 25, 2011

Arthur J. Amchan Administrative Law Judge

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), of daily compounding interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued.